SEAN O'CASEY PATTERSON

v.

CHAN HOONG POH & ORS

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CIVIL APPEAL NO: 01( )-3-2010(W)]
27 JANUARY 2011

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Framing of questions for determination by Federal Court - Whether appellate panel ought not consider issues not framed as questions - Whether questions may be amended or added during hearing of appeal*

FAMILY LAW: *Children - Adoption - Adoption under Registration of Adoption Act 1952 - Whether requirements for adoption satisfied - Identity of biological father unknown at time of adoption - Whether consent of biological father should have been obtained for the adoption - Whether where both biological parents living, consent of both parents must sought - Welfare of child to be considered in widest sense in dispensing with consent of any parent - Whether rights of biological parents remain and are not extinguished despite registration of adoption under Registration of Adoption Act 1952*

FAMILY LAW: *Children - Adoption - Muslims - Whether Registration of Adoption Act 1952 applicable to Muslims - Registration of Adoption Act 1952 enacted to cater for Muslims*

The plaintiff/appellant (an American citizen) claimed that he and the 1st respondent were married in Las Vegas. The 1st respondent denied the marriage but agreed to having lived with the appellant as a result of which she had given birth to a baby boy named Jordan Ter Wei ("Jordan"). The appellant and the 1st respondent lived separately when Jordan was born. The appellant later discovered that Jordan's original birth certificate contained someone else's name as the father. A DNA profiling test confirmed that the appellant was the biological father of Jordan. Following this, the appellant went to the Jabatan Pendaftaran Negara to rectify Jordan's birth certificate. There, he discovered that the 2nd and 3rd respondents had adopted Jordan under the Registration

of Adoption Act 1952 ("Act 253"). The 2nd and 3rd respondents being Muslims had converted Jordan who now went by the name of Eusof Jordan Nik Ahmad. The appellant therefore applied to the High Court for the following orders and declarations: (i) that the appellant was the biological father of Jordan; (ii) that the register be amended to name the appellant as the father of Jordan; (iii) that the register be amended to change Jordan's name back to Jordan O' Casey Patterson; (iv) that Jordan's adoption by the 2nd and 3rd respondents and the registration of the adoption was null and void and be set aside; (v) that the appellant be granted sole and exclusive guardianship, custody, care and control of Jordan; (vi) that the conversion of Jordan to Islam was null and void; and (vii) that Jordan be delivered to the appellant immediately. The appellant sought to set aside the adoption, *inter alia*, on the grounds that Act 253 is not applicable to Muslims and the lack of consent by biological parents. The learned Judicial Commissioner only allowed the first two prayers. The Court of Appeal dismissed the appellant's appeal. The Court of Appeal also reversed the order of the High Court granting the appellant's 2nd prayer: that the birth certificate be rectified. The appellant's 1st prayer was maintained by the Court of Appeal. The appellant obtained leave to appeal to the Federal Court on the following questions: (i) Whether the appellant's consent should be obtained for the registration of adoption of his son under Act 253; (ii) Whether s. 6 of Act 253 should be read such that where there are two parents living, both parents' consent should be sought for the registration of adoption of a child under Act 253; (iii) Whether in dispensing with consent of any parent to the registration of the adoption under Act 253, the welfare principle which the Registrar must apply in exercising his discretion under the proviso to s. 6 of Act 253 is the welfare of the child in adoption cases and not custody cases; and (iv) Whether the rights of the appellant remained and were not extinguished despite the registration of the adoption of the child.

Held (dismissing the appeal with costs)
Per James Foong FCJ delivering the judgment of the court:

(1) At the time when the 2nd and 3rd respondents applied to register the adoption of Jordan, Jordan's father was listed in his birth certificate as one, Bart. It was only after the adoption was made and subsequent DNA test conducted, that

the appellant was confirmed as the biological father. Since appellant was not known to be the father of Jordan when the application for the registration of the adoption was made, his consent was irrelevant. Thus, the answer to the first question was in the negative. (para 38)

(2) Section 6 of Act 253 plainly says "or one of the parents". It simply means any one parent without the need to prove that the other is either dead or cannot be found. The 2nd question was answered in the negative. (para 42)

(3) Act 253 was enacted to cater for Muslims whose personal laws are repugnant to adoption yet it is a common practice for Muslims in this country to "adopt" a child. (para 63)

(4) The meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another. Thus, the third question was answered in the positive. (para 58)

(5) There is a distinction between the rights of the adoptive parents over the child in an adoption registered under Act 253 and the validity of the adoption itself. Just because the adopter parents under Act 253 have only custodian, care, maintenance and educational right over the child, it does not mean that the adoption is invalidated by the appearance of a natural parent who demands it so. The adoption remains valid. (para 69)

(6) The issue of the 3rd and 4th respondents' right to convert Jordan to a Muslim was not reflected in the questions posed to the court. Although it was held in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd* that questions can be amended and added from those originally posed, there was no formal application to add the question. Thus, the issue could not be entertained. (paras 72 & 73)

(7) The Court of Appeal had erred in revoking the 2nd order of the High Court in respect of rectifying the birth certificate of Jordan to reflect the appellant as the father. This part of the order of the Court of Appeal was therefore set aside and the 2nd order granted by the High Court was reinstated. (para 74)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu (seorang rakyat Amerika Syarikat) mendakwa bahawa dia dan responden pertama telah berkahwin di Las Vegas. Responden pertama menafikan perkahwinan tetapi bersetuju telah bersekedudukan dengan perayu sehingga mendapat seorang anak lelaki yang dinamakan Jordan Ter Wei ("Jordan"). Perayu dan responden pertama sudah tinggal berasingan bilamana Jordan dilahirkan. Perayu kemudian mendapati bahawa sijil kelahiran Jordan mengandungi nama seorang orang lain sebagai bapanya. Ujian profail DNA mengesahkan bahawa perayu adalah bapa kandung Jordan. Berikutnya perayu telah pergi ke Jabatan Pendaftaran Negara bagi membetulkan sijil kelahiran Jordan. Di situ perayu mendapati bahawa Jordan telah diambil sebagai anak angkat oleh responden-responden kedua dan ketiga di bawah Akta Pendaftaran Pengangkatan 1952 ('Akta 253'). Juga, responden-responden kedua dan ketiga, sebagai orang Islam, telah mengislamkan Jordan yang kini dikenali sebagai Eusof Jordan Nik Ahmad. Perayu dengan itu telah memohon ke Mahkamah Tinggi untuk perintah-perintah dan pengisytiharan berikut, iaitu: (i) bahawa perayu adalah bapa kandung Jordan; (ii) bahawa daftar dipinda bagi menamakan perayu sebagai bapa Jordan; (iii) bahawa daftar dipinda bagi menukar nama Jordan kepada nama Jordan O' Casey Patterson; (iv) bahawa pengangkatan Jordan oleh responden-responden kedua dan ketiga dan pendaftaran pengangkatan adalah tak sah dan batal dan harus diketepikan; (v) bahawa perayu diberi penjagaan dan kawalan tunggal dan eksklusif ke atas Jordan; (vi) bahawa pemelukan Islam Jordan adalah tak sah dan batal; dan (vii) bahawa Jordan dikembalikan kepada perayu dengan serta merta. Antara lain, alasan perayu untuk mengenepikan pengangkatan adalah bahawa Akta 253 tidak terpakai kepada orang Islam dan juga kerana ketiadaan persetujuan oleh ibubapa kandung. Yang arif Pesuruhjaya Kehakiman hanya membenarkan dua permohonan pertama perayu, sementara Mahkamah Rayuan telah menolak rayuan perayu. Mahkamah Rayuan juga, walaupun membenarkan permohonan pertama perayu, telah mengakas perintah Mahkamah Tinggi yang membenarkan permohonan keduanya; iaitu bahawa sijil kelahiran hendaklah diperbetulkan. Perayu memperoleh kebenaran Mahkamah Persekutuan untuk merayu atas persoalan-persoalan berikut: (i) Sama ada izin perayu harus terlebih dahulu diperolehi bagi

mendaftarkan pengangkatan anaknya di bawah Akta 253; (ii) Sama ada s. 6 Akta 253 harus dibaca sebegitu rupa sehinggakan, jika ibu dan bapa si anak masih hidup, maka persetujuan kedua-duanya harus diperolehi bagi mendaftarkan pengangkatan di bawah Akta 253; (iii) Sama ada, dalam menyisihkan persetujuan mana-mana ibubapa bagi maksud pendaftaran pengangkatan di bawah Akta 253, prinsip kebajikan yang harus digunapakai oleh Pendaftar dalam melaksanakan budibicaranya di bawah proviso kepada s. 6 Akta 253 adalah kebajikan kanak-kanak dalam kes-kes pengangkatan dan bukan dalam kes-kes penjagaan; dan (iv) Sama ada hak-hak perayu masih kekal dan tidak terhapus walaupun dengan wujudnya pendaftaran pengangkatan anaknya.

Diputuskan (menolak rayuan dengan kos)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

(1) Pada masa responden-responden kedua dan ketiga memohon untuk mendaftar pengangkatan Jordan, bapa Jordan telah dicatit di dalam sijil kelahirannya sebagai seorang Bart. Hanyalah selepas pengangkatan dibuat dan ujian DNA dibuat kemudiannya, bahawa perayu telah disahkan sebagai bapa kandung. Oleh kerana perayu tidak diketahui sebagai bapa kepada Jordan semasa permohonan untuk pengangkatan dibuat, maka izin beliau adalah tidak relevan. Oleh itu, jawapan kepada persoalan pertama adalah berbentuk negatif.

(2) Seksyen 6 Akta 253 menyatakan dengan jelas "or one of the parents". Ia secara nyata bermaksud mana-mana seorang dari ibubapa tanpa perlu membuktikan bahawa yang seorang lagi sudah meninggal atau tidak boleh dijumpai. Maka persoalan kedua dijawab secara negatif.

(3) Akta 253 digubal untuk memenuhi keperluan masyarakat Islam di mana undang-undang diri mereka tidak merestui pengangkatan sedangkan ianya menjadi amalan biasa bagi orang Islam di negara ini untuk mengambil "anak angkat".

(4) Maksud kebajikan harus dilihat secara yang lebih meluas dan semua faktor yang perlu diberi perhatian hendaklah dipertimbang secara timbal balik antara satu sama lain. Oleh itu, jawapan ketiga dijawab secara positif.

(5) Terdapat perbezaan antara hak ibubapa angkat terhadap kanak-kanak dalam pengangkatan di bawah Akta 253 dan kesahan pengangkatan itu sendiri. Cuma kerana ibubapa angkat di bawah Akta 253 hanya mempunyai hak custodian, care, maintenance and educational ke atas kanak-kanak, tidak bermakna bahawa pengangkatan menjadi terbatal apabila wujud bapa kandung yang menuntut pembatalan tersebut. Pengangkatan adalah masih kekal sah.

(6) Isu berkaitan hak responden-responden ketiga dan keempat untuk mengislamkan Jordan tidak terserlah melalui persoalan yang dikemukakan kepada Mahkamah. Walaupun ianya diputuskan di dalam kes *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd* bahawa soalan boleh dipinda dan ditambah dari apa yang dikemukakan pada asalnya, tiada permohonan formal dibuat di sini bagi menambah soalan. Oleh itu, isu ini tidak boleh dilayan.

(7) Mahkamah Rayuan khilaf dalam membatalkan perintah kedua Mahkamah Tinggi berkaitan membetulkan sijil kelahiran Jordan bagi mencerminkan perayu sebagai bapanya. Bahagian perintah Mahkamah Rayuan ini dengan itu diketepikan dan perintah kedua Mahkamah Tinggi dikekalkan.

Case(s) referred to:

Awang Tengah AG Amin v. Sabah Public Service Commission & Anor [1998] 2 CLJ Supp 409 HC ***(refd)***

J v. C [1970] AC 668 ***(refd)***

Jainah Semah v. Mansor Iman Mat & Another [1951] 1 LNS 31 HC ***(refd)***

Khor Liang Keow lwn. Tee Ming Kook [1996] 2 CLJ 631 HC ***(refd)***

Low Pak Houng v. Tan Kok Keong [1998] 1 CLJ Supp 357 HC ***(refd)***

Low Pek Nai v. Koh Chye Guan [1995] 2 CLJ 110 HC ***(refd)***

Re Baby M (an infant) [1994] 1 LNS 195 HC ***(refd)***

Re Balasingam & Paravathy, Infants; Kannamah v. Palani [1970] 1 LNS 134 HC ***(refd)***

Re Loh Toh Met, deceased, Kong Lai Fong & Ors v. Loh Peng Heng [1961] 1 LNS 109 HC ***(refd)***

Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 HC

T v. O [1992] 1 LNS 45 HC ***(refd)***

Tan Siew Kee v. Chua Ah Boey [1987] 1 LNS 77 HC ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***
Wong Pot Heng v. Zainal Aibidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
Adoption Act 1952, s. 31
Courts of Judicature Act 1964, s. 96(a)
Federal Constitution, art. 12(4)
Guardianship of Infants Act 1961, ss. 1(2)(a), (3)(a), 5(1), 6
Registration of Adoptions Act 1952, ss. 5, 6(1), (2), 8, 10(1)
Rules of the Federal Court 1995, r. 47(4)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, reissue, para 443
Halsbury's Laws of Malaysia, 2003 Reissue, vol 8, paras 140-073
Professor Mimi Kamariah Majid, *Family Law in Malaysia,* pp 217, 218

For the appellant - YN Foo (Kiran Dhaliwal with her); M/s YN Foo & Partners
For the respondents - Sharmini Jayan (Ravichandran & Ng Chung Yee with her); M/s Seah Balan Ravi & Co

Reported by Amutha Suppayah

JUDGMENT

James Foong FCJ:

Introduction

[1] To fully appreciate the four questions posed to us, we shall start by stating the facts of this case. We shall describe the parties as they were in the court of first instance.

Background

[2] The plaintiff is an American citizen. In December 1998, when he was in Malaysia, he met the 1st defendant, a Malaysian of Chinese origin. They started dating. Sometime in April 1999, the 1st defendant travelled to the United States of America to visit the plaintiff. There at the 'Little Church of the West', in Las Vegas, she got "married" to the plaintiff. After that, the 1st defendant returned to Malaysia while the plaintiff remained in America.

[3] On 21 March 2000, the 1st defendant gave birth to a boy in Kuala Lumpur. She gave him an English name followed by the Chinese name but for the sake of the child we shall refer him as J. The 1st defendant must have indicated to the plaintiff that J is his son for soon after birth, the plaintiff travelled to Malaysia to be with the 1st defendant and J. He even attended J's christening ceremony. Subsequently, the plaintiff claimed to have travelled to Malaysia on a number of occasions to see the 1st defendant and J and at one time all three travelled to Manila. Initially, according to the plaintiff, he had planned for the 1st defendant and J to live in America but when it became apparent that the 1st defendant was reluctant, he dropped the idea. Nevertheless, he continued to send money to the 1st defendant for herself and J.

[4] Sometime in September 2004, intending to set up a more structured maintenance scheme for J, the plaintiff engaged the services of a firm of solicitors. Through them, he discovered that in J's birth certificate he is not named the father. Instead, it was "Engelbertus Antonious Marius Van Hoek" ("Bart"). Prior to this, the plaintiff claimed that the 1st defendant had informed and shown to him a copy of J's birth certificate listing his name as the father of this child. He later discovered that this document was tampered with to make it appear that he was the father. Why this was done will soon become apparent as the saga unfolds.

[5] When the plaintiff realized this, he secured a profiling test for J and himself. It confirmed that he is the natural father of J. But things did not stop there. In the course of this, he discovered that J was adopted by the 2nd and 3rd defendants on 18 February 2004 and they have subsequently converted him into the Islamic faith. J's name was changed to an Islamic name.

[6] The 2nd defendant is the sister of the 1st defendant. She has converted to the Islamic faith when she married the 3rd defendant, a Muslim. Initially, the 2nd defendant had assisted the 1st defendant in looking after J when the latter went to work. Eventually, according to the 2nd and 3rd defendants, J was left to their care and ultimately, the 1st defendant consented to their adoption of J. This, however, was denied by the 1st defendant who insisted that at no time had she relinquished custody of J to the 2nd and 3rd defendants though she admitted, except when

she was at work. As to the adoption, she maintained that she has never consented to it nor to the conversion of J to the Islamic faith and the change of his name. A

[7] Enraged by this, both the plaintiff and the 1st defendant took out originating summonses against the 2nd, 3rd, 4th and 5th defendants. In the plaintiff's application, he requested that: B

(a) he be declared the biological father of J;

(b) the 4th and 5th defendants (who are the Registrar of Births and Deaths and Registrar of Adoptions respectively) rectify their respective registers to name him as the father; C

(c) the 4th defendant rename J to his original name;

(d) the adoption of J by the 2nd and 3rd defendants be declared null and void; D

(e) he be granted sole custody and guardianship of J;

(f) the conversion of J to the Islamic faith be declared null and void; E

(g) the 3rd and 4th defendants to deliver J to him; and

(h) he be allowed to take J out of jurisdiction.

[8] The 1st defendant on the other hand claimed almost identical prayers regarding adoption and conversion but demanded custody, care and control of J be granted to her instead. F

[9] The 2nd and 3rd defendants challenged the requests of both the plaintiff and the 1st defendant, while the 4th and 5th defendants maintained that the adoption and conversion were according to procedure. G

[10] Now let us return to unfold the mystery surrounding some of the 1st defendant's actions that led to this complication. According to the 1st defendant herself, when she met the plaintiff she was married to a Malaysian known as John Kung from Sarawak with whom she had a daughter. The marriage did not work out and while waiting for her divorce to come through, she met Bart, a Dutch national. She had a son by him whom she named W. But instead of putting Bart as the father of W in W's H I

A birth certificate, she named John Kung instead. While living with Bart she had an affair with the plaintiff resulting in the birth of J. And here again, instead of listing the plaintiff as the father, she named Bart as the father in J's birth certificate. The 1st defendant admitted travelling to America and underwent a so called marriage
B ceremony in Las Vegas with the plaintiff. She dismissed this as a real marriage. According to her, it was more of a pledge of love in an informal setting to a prelude for a formal wedding in Malaysia in the future.

C **[11]** As to why she has named Bart as J's father in J's birth certificate, the 1st defendant claimed that it was done at the request of Bart. At that time, she was having a difficult relationship with Bart and there was a tussle with him over the custody of W. To pacify Bart, she acceded to Bart's request that he be
D named father in J's birth certificate as an indication that she would marry him. We find this logic rather strange but then, in human intercourse, strange things which defy all logic do happen. Eventually, the relationship with Bart did not work out and W followed Bart while the 1st defendant took J away. Just to
E complete this part of the saga, Bart also had a paternal test done on W which confirmed that W was his child. This came about through a legal process instituted by Bart against the 1st defendant and by coincidence Bart's solicitors were the same as those engaged by the plaintiff. And when notes were exchanged
F in these two cases, the plaintiff became acquainted with the intimate details of what transpired behind his back, so to speak. This caused him to accuse the 1st defendant of deception and being unfit to have custody of J. Regarding the falsification of J's birth certificate to bear the plaintiff's name as the father, the 1st
G defendant explained that this was done for the purpose of J's admission to an international school.

[12] In the High Court, the 1st defendant eventually agreed not to contest against the plaintiff for the custody of J. Instead, she
H joined the plaintiff in challenging the 2nd and 3rd defendants, as well as the 3rd, 4th and 5th defendants over the adoption and conversion of J.

[13] We now turn to the version proffered by the 2nd and 3rd defendants. Aside from their insistence that the 1st defendant had
I left J to their care while the 1st defendant was busy with her

work and social activities, they claimed that the 1st defendant had consented in writing to their adoption of J. This was in a statutory declaration signed by the 1st defendant. This document was tendered as an exhibit and is found at p. 881 of vol. 3 part B of the Appeal Record. The title of this document declares:

Surat Keizinan Pengangkatan Akuan Berkanun

(Translated: Statutory Declaration (Letter for Permission to Adopt)

[14] Below are particulars such as the name of the 1st defendant and her address. The same goes for J and the 2nd and 3rd defendants.

Bart's name appears as father but his whereabouts is stated as Tidak Boleh Di Hubungi" (Translated: cannot be contacted). This declaration has a signature at the bottom left and the right and then further down is a signature of the commissioner for oath and his stamp bearing his name and address.

[15] In this statutory declaration, the 1st defendant has affirmed that she consented to the adoption of J by the 2nd and 3rd defendants.

[16] The 1st defendant has vehemently denied that she signed this declaration and asserted that the first time she became aware of this was when she received a call from an officer of the 5th defendant that the plaintiff was attempting to cancel J's adoption.

High Court

[17] In the High Court, both the plaintiff's application and that of the 1st defendant were heard together. Regrettably, all parties agreed that these applications be tried on affidavit evidence when it was obvious, from the contents of the documents filed, there were serious dispute as to facts. Before us now, the plaintiff is contending that the learned High Court judge has erred in making a finding based on contentious facts asserted in the affidavits. We shall deal with this later.

[18] After deliberation, the High Court allowed the plaintiff's 1st and 2nd prayer: a declaration that he is the natural father of J and that the birth certificate of J be rectified to reflect this. The rest were dismissed.

[19] As regards to the 1st defendant's application, it was dismissed.

[20] The reasons given by the High Court can be summarised as follows:

(a) The DNA test positively confirmed the plaintiff as the natural father of J. The 1st defendant herself has also admitted this. Further, Bart, in his statutory declaration, has acknowledged that he is not the natural father of J. On top of this, the 2nd and 3rd defendants do not dispute this fact.

(b) As to the plaintiff's contention that the Registration of Adoptions Act 1952 (Act 253) does not apply to Muslims, there is no express provision therein to declare this. Thus, the 2nd and 3rd defendants were entitled to register the adoption of J under this Act.

(c) As the 1st defendant is not a truthful witness, there is "little or no weight to be attached to" the claim by the 1st defendant that she did not consent to this adoption by the 2nd and 3rd defendants "especially in the light of other evidence as to her conduct".

(d) The plaintiff's consent to the registration of the adoption of J is unnecessary since the Guardianship of Infant Act, 1961 (GIA) though bestowing upon the plaintiff, as the father of the child, equal right as that of the mother, is not applicable to an illegitimate child like J.

(e) The 2nd and 3rd defendants having fulfilled all the conditions and requirements under s. 6 of Act 253 were qualified to apply for the registration of the adoption of J.

(f) The 5th defendant was duty bound to accept the statutory declaration of the 1st defendant consenting to the adoption of J by the 2nd and 3rd defendants "especially when the would be adoptive mother is the sister of the child's natural mother."

Court Of Appeal

[21] Dissatisfied with the decision of the High Court, both the plaintiff and the 1st defendant appealed to the Court of Appeal. The Court of Appeal not only dismissed these appeals but also

reversed the order of the High Court granting the plaintiff's 2nd prayer: that the birth certificate of J to be rectified. The plaintiff's 1st prayer was maintained by the Court of Appeal.

[22] The reasons given by the Court of Appeal were:

(a) The purported marriage between the plaintiff and the 1st defendant in Las Vegas is void since the 1st defendant, at that material time, was still married to John Kung.

(b) Act 253 applies to Muslims.

(c) The finding by the High Court that the 1st defendant had given her consent to 2nd and 3rd defendants to adopt J should not be disturbed.

(d) As the plaintiff was not listed as the natural father of J at the time when the application for adoption was made, his consent was not relevant.

(e) The 5th defendant had exercised his discretion in dispensing with the consent and presence of any parent during the adoption proceeding of J. Though Bart was named as J's father, he was not contactable. And this was declared in the 1st defendant's statutory declaration.

(f) The granting of any other prayers requested by the plaintiff "would not be in the best interest of the child concerned."

Questions posed

[23] The following were the questions posed to this court:

1. Whether the appellant father's (plaintiff) consent should be obtained for the registration of adoption of his son under the Registration of Adoptions Act 1952.

2. Whether s. 6 of the Registration of Adoptions Act 1952 should be read such that where there are two parents living, both parents' consent should be sought for the registration of adoption of a child under the Registration of Adoptions Act 1952.

3. In dispensing with consent of any parent to the registration of the adoption under the Registration of the Adoption Act 1952, the welfare principle which the Registrar must apply

A in exercising his discretion under the proviso to s. 6 of the Registration of Adoption Act 1952 is the welfare of the child in adoption cases and not custody cases.

4. Whether the rights of the appellant (plaintiff), the biological father, remain and are not extinguished despite the registration of the adoption of the child.

B

Questions 1: Whether The Appellant Father's (Plaintiff's) Consent Should Be Obtained To The Registration Of Adoption Of His Son Under The Registration Of Adoptions Act 1952

C

[24] Miss Foo, counsel for the plaintiff, argued that the plaintiff's consent should have been sought before the 5th defendant approves the registration of J's adoption. She pointed out that under the Guardianship of Infants Act 1961 ("GIA"), (which came into effect on 1 October 1999), the father and mother have the same rights and authority over the child. This is conferred by s. 5(1) of GIA which says:

D

> In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law "as the law allows to a father, and the rights and authority of mother and father shall be equal." (Prior to 1 October 1999, such rights and authority were only accorded to the mother).

E

F **[25]** When such rights and authority are conferred upon the plaintiff as the natural father of J, then according to Miss Foo the plaintiff's consent should be sought. Since this never took place, J's adoption is invalid.

G **[26]** Mr Ravi, counsel for the 2nd and 3rd defendants, however argued that GIA does not apply to an illegitimate child. And this can be found in s. 1(3) of the GIA as well as in a number of decided authorities.

H **[27]** Section 1(3) of the GIA reads:

> Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:

I

(a) Nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion.

[28] The issue here is not religion as both the plaintiff and the 1st defendant are non Muslims. The contention is the legitimacy of J: if J is illegitimate, would GIA confer upon the plaintiff a parental right over J and, if so, whether the plaintiff's consent was required for the purpose of J's adoption.

[29] It is not in dispute that J is illegitimate. When he was born, both the plaintiff and 1st defendant were not married to each other. It was decided in *Re Balasingam & Paravathy, Infants; Kannamah v. Palani* [1970] 1 LNS 134, that the court has no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate child under GIA. The reason was there being no provision under this Act to provide for an illegitimate child, and this "proposition is fortified by the respondent's arguments on the correct construction of the words "father" and "mother" in ss. 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father" or "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to "illegitimate children".

[30] This proposition was followed in *T v. O* [1992] 1 LNS 45, a decision of the High Court where Shankar J (as he then was) said:

> Of course in a case where illegitimacy is clear, and there never was any question of a marriage either *de facto or dejure*. I would respectfully agree with the court in *Re Balasingam* and *Paravathy*, but only to the extent that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order.

[31] In another High Court case of *Low Pak Houng v. Tan Kok Keong* [1998] 1 CLJ Supp 357, Aziz J (as he then was) viewed it in this manner:

> Sub-section (2)(a) (formerly s. 1(2)) does not prove that Parliament intended to change the law from what it had been under the 1935 Ordinance (Guardianship of Infants Ordinance of the Straits Settlements). Certainly it does not prove that Parliament intended that under section 5 of the 1961 Act the father of an illegitimate child should be the guardian of the child. For that express words are necessary.
>
> Neither ought the omission of the word 'lawful' from section 6 to be construed as denoting that Parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy circumstance of the presence of the word 'lawful' in section 6 of the Ordinance is an indication that section 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from section 6 in the 1961 Act ought not be construed as denoting a change of intention. It is not safe to so construe. For such radical change in the law, there must be express words to give effect to it.
>
> I am therefore of the view that section 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate cannot claim guardianship under it.

[32] Similar ruling was also made in the case of *Khor Liang Keow lwn. Tee Ming Kook* [1996] 2 CLJ 631, by Zulkefli Makinudin JC (as he then was).

[33] There are however two High Court decisions which disagree with the above. They have ruled that GIA applies to an illegitimate child. Their reasons are as follows:

[34] In *Low Pek Nai v. Koh Chye Guan* [1995] 2 CLJ 110, Hishamudin J (as he then was) contended that:

> With greatest respect to the views of the learned judge in *Re Balasingam*, in the present case, I propose to adopt a different view. Unlike the English Acts, our Act does refer to illegitimate children and such reference can be found in the application section. Section 1(3) states:
>
> > The above provision, it will be noted, contemplates that the state legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is legitimate or illegitimate to the extent that such an application is not contrary to Islamic law. Now, if this provision contemplates

> such an application as regards to Muslim children, then, in my view, the Act must apply to children, generally legitimate or illegitimate.
>
> I, therefore, rule that the Act applies also to illegitimate children and that, in the present case, I have jurisdiction to hear the application.

[35] The next is the decision by Jeffery Tan J (as he then was) in *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] 2 CLJ 435, 439. The following were his views:

> Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality of parental rights, there is less reason to doubt that the GIA in the present form does not apply to illegitimate children. Presently, the position in England is that "the statutory provisions relating to orders for custody of, and rights of assess to, a minor on the application of a mother or father apply in relation to as a minor who is illegitimate as they apply in relation to a minor who is legitimate" (*Halsbury's Law of England*, 4th edn, para 548). Perhaps it would require further study, but *Low Pek Nai v. Koh Chye Guan* might have fortuitously and correctly stated the law.

[36] As correctly observed in *Re Balasingam (supra)*, there is a "remarkable absence of any reference to illegitimate children other than in the above mentioned s. 1(2)(a) (now changed to s. 1(3)(a)." But then, one cannot ignore the fact that this word "illegitimate" appears in s. 1(3)(a) of GIA 1961. Undeniably, this word here is used for the purpose of excluding all mothers who professes or professed the Islamic faith from the benefits of the provisions of this Act. But why did Parliament single out an illegitimate child of a mother who professes or professed the Islamic religion? If Parliament had intended this Act to apply only to a legitimate child it could have kept silent on the issue of legitimacy in this section like in the remaining part of the Act. There is no necessity to express this to cover an illegitimate child in s. 1(3)(a). By specifically highlighting this to say that "in the case of an illegitimate child" it must have been intended, in our opinion, to be a reminder, not to exclude those who are illegitimate. Thus, this Act should apply to all children, legitimate as well as illegitimate. Otherwise, we see no reason, why an illegitimate child is singled out for mention in s. 1(3)(a) GIA.

[37] In *Re Balasingam*, the rationale for excluding an illegitimate child, despite the presence of the word 'illegitimate' in s. 1(2)(a) (now s. 1 (3)(a)) GIA 1961, was because the courts in England had interpreted the English Guardianship Acts of a 'father' and 'mother' to be only those lawfully married; thus their child is legitimate. And this was used in that case to support the proposition that it is the same in Malaysia. But this approach plainly ignores the fact that we have in Malaysia our own GIA which contains s. 1(3)(a). And this provision specifically expresses "in the case of an illegitimate child". We are of the view that there is no requirement for us to look further than this provision especially to s. 5 of GIA, like what was done in *Low Pak Houng v. Tan Kok Keong (supra)* to decide on whether the GIA includes or excludes an illegitimate child. We conclude that the wordings of s. 1(3)(a) of the GIA is sufficient to imply that this Act applies to an illegitimate child.

[38] Possessing such right and authority equivalent to that of the 1st defendant over J is one thing but whether the consent of the plaintiff was required for the purpose of the registration of this adoption is another. At the time when the 2nd and 3rd defendants made their application to register the adoption of J, the plaintiff was not known to be the biological father of J. J's father was listed in J's birth certificate as Bart. It was only after the adoption was made and subsequent DNA test conducted, that the plaintiff was confirmed as the biological father of J. If the plaintiff was not known or confirmed to be the father of J when the application for the registration of the adoption was made, then his consent was irrelevant. By this deduction, our answer to the first question is in the negative.

Question 2: Whether s. 6 Of Act 253 Should Be Read Such That Where Two Parents Are Living, Both Parents' Consent Should Be Sought For The Registration Of The Adoption Of A Child Under This Act?

[39] To answer this, we turn to s. 6 of Act 253 which reads:

> Registration of *de facto* adoptions
>
> 6 (1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any *de facto* adoption, and has for a

period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if:

(a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place;

(b) the parents or one of the parents, or, if both parents are dead or if neither of the parents is within Peninsular Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption;

Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and

(c) the prescribed fees are paid.

(2) The Registrar shall register an adoption by entering the particulars thereof in the register.

[40] According to Miss Foo, this provision demands:

(a) If both parents are alive, both must appear before the Registrar to express their consent to the adoption.

(b) If there is only one parent (ie, the other no longer alive) then he or she shall appear before the Registrar and express his or her consent to the adoption.

(c) If both parents are dead or if neither of the parents is within West Malaysia, then the guardian, if any, shall appear before the Registrar and express consent to the adoption.

This "would give effect to all of the words" in this section as required in the construction of a statute.

[41] With respect, we do not subscribe entirely to this interpretation. Aside from the other qualifications demanded in s. 6 of Act 253, regarding the appearance before the Registrar (not at this stage taking into account the proviso) the following are required:

A (a) the person or the spouses who wish to adopt the child must together with the proposed child to be adopted appear before the Registrar;

(b) "the parents or one of the parents" must appear to express
B his/her or their consent to the adoption; or if both are dead or if neither of them are within Peninsular Malaysia, then any guardian of the child can appear to give his consent to the adoption.

C **[42]** Regarding the second category concerning "or one of the parents" can appear before the Registrar, we cannot see how Miss Foo can interpret this to add a qualification that the other parent is "no longer alive". There is just no word or words to this effect in this section. This section plainly says "or one of the parents". With such description, it simply means any one parent without the
D need to prove that the other is either dead or cannot be found. When words here are precise and unambiguous then the literal and strict construction rule must apply. We cannot read or imply into the laws what is not there - see *Wong Pot Heng v. Zainal Aibidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312.
E

[43] But in this case neither parents of the child appeared. According to the 5th defendant he invoked the proviso under s. 6(1) of Act 253 since he was satisfied that "in all the circumstances of the case it is just and equitable and for the
F welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration."

G **[44]** Miss Foo however argued otherwise. She is of the view that the 5th defendant was required to do more than just peruse the documents before he can exempt the presence and consent of the parent or parents. She supported this argument by claiming that s. 10 of Act 253 requires the 5th defendant to keep a note-book
H and must record "all evidence taken by him (Registrar) in any proceeding under this Act" in this note-book - s. 5 of Act 253. This requirement implies that the 5th defendant is required to investigate before he exercises his rights of exemption.

I **[45]** To deal with this, we first look at s. 10(1) of Act 253 which says:

> If the Registrar is not satisfied of the truth of any statement made to him he may refuse to register the adoption or if he requires evidence with regard to any particulars required to be registered he may postpone registration and he may call for any further evidence that he thinks necessary;
>
> Provided that the Registrar shall record in the Registrar's note-book his reasons for any such refusal or postponement.

[46] And then in s. 5 of Act 253:

> Every Registrar appointed under this Act shall keep a register in the form in the Second Schedule and he shall enter therein the particulars to be registered concerning the adoption and he shall also keep a book called the Registrar's note-book in which he shall record in his own hand all proceedings in respect of the registration of any adoption, the details of the identity of the adopted child, the name of the person, "adopting it, the name of the person" if any, consenting to the adoption and all evidence taken by him in any such proceeding under this Act.

[47] These provisions firstly cater for situations where the 5th defendant is dissatisfied with the truth of any statement made to him. Secondly, it records all particulars of the registration for the adoption. So before the 5th defendant records his reason for refusing to register the adoption in his note-book, he must foremost be dissatisfied. But in this case, there is no evidence that he was dissatisfied. Even if he was dissatisfied, these two sections of Act 253 do not, in our opinion, confer upon him a duty to investigate the truth of the statement presented to him. All that is necessary is to refuse registration. Further, under s. 8 of Act 253:

> (1) Every person who gives evidence before the Registrar shall be bound to state the truth and to answer truthfully all questions which the Registrar may put to him.
>
> (2) Any person who gives any evidence in any enquiry under this Act which he knows to be untrue, or who does any other act, which if done in a judicial proceeding would be punishable under Chapter XI of the Penal Code [Act 574], shall be punishable on conviction as provided in that Chapter in the same way as if the act had been done in or in relation to a judicial proceeding.

[48] We shall now turn to the issue of the authenticity of the statutory declaration. The significance of this declaration is that the 5th defendant can dispense with the requirement of the appearance of the parents or one of them and their or his consent to the registration of the adoption. As we have expressed earlier, the trial judge ascertained the truth of this by preferring one version in the affidavit to that of another instead of deciding this by way of *viva voce* evidence. In the light of this we return to what was said by the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24:

> if allegations are made on affidavits by the petitioner and those allegations are creditably denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[49] Using this as a guide, we first separated the disputed facts from the undisputed. What is disputed is the claim by the 1st defendant that she did not sign this statutory declaration whilst the 2nd and 3rd defendants insisted that she did so voluntarily. There is however no dispute that such a document existed and that it was presented to the 5th defendant. Further, there was no dispute that this document bears two signatures which were attested by the commissioner for oaths and the name of the person who had signed this document was the 1st defendant. Adding to this, there is no dispute that there was a commissioner for oaths and he too signed on this document as a witness to the person who executed this document. Also not in dispute is the fact that this commissioner for oaths had affixed his stamp bearing his name and registration on this document. Based on these undisputed facts and ignoring those that are disputed, a finding can be reached that such a document existed bearing the signatures of the maker who bears the 1st defendant's name and her signatures were attested to by a registered commissioner for oaths.

[50] Once this document was presented to the 5th defendant, his duty was to exercise his discretion granted to him by the proviso of s. 6(1) of Act 253. In doing so he "must apply its (his) own mind to the facts and circumstances of each case and come to its (his) own decision. If authority acts without applying its (his) mind to the case before it, then the action or decision taken by it will

be bad because the authority has not exercised its discretion" – see Professor MP Jain in his text *'Administrative Law of Malaysia and Singapore'*, 3rd edn, (as quoted in *Awang Tengah AG Amin v. Sabah Public Service Commission & Anor* [1998] 2 CLJ Supp 409, 431). Aside from this, he must take into account the following factors: first, all circumstances of the case; second, is that it is just and equitable to do so; and third, for the welfare of the child to do so.

[51] From what we have discussed earlier, we are of the view that the 5th defendant had taken into account the relevant factors and applied them to the facts of this case before coming to a decision. For this, we see no reason to interfere with what he has decided as it was done in accordance with the law.

[52] For reasons aforesaid, our answer to the 2nd question is in the negative.

Question 3: In Dispensing With Consent Of Any Parent To The Registration Of The Adoption Under The Registration Of The Adoptions Act 1952, The Welfare Principle Which The Registrar Must Apply In Exercising His Discretion Under The Proviso To s. 6 Of The Registration Of Adoptions Act 1952 Is The Welfare Of The Child In Adoption Cases And Not Custody Cases

[53] According to *Halsbury's Laws of England*, 4th edn, reissue (Mackay edition), para 443 the term, "welfare principle" is a set of factors used when "a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration". In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved. Thus, this term "welfare principle" relates to certain factors to be considered and their priority during deliberation in such cases.

[54] This difference in application is illustrated in *Re Baby M (An infant)* [1994] 1 LNS 195, where Visu Sinnadurai J said:

> One major problem confronting the courts has been the question of the welfare of the child. As stated earlier, the adoption proceedings, unlike the position in custody cases, the law provides that the welfare of the child is only one of the factors to be considered by the court; whereas in custody cases the welfare of the child is the main consideration.

[55] But we are not here to consider priorities. We are dealing with registration of a *de facto* adoption of a child under Act 253 and under the proviso of s. 6, the relevant factors necessary for consideration regarding dispensation are explicitly set out. It encompasses, as we have stated: all the circumstances of the case; it is just and equitable; and for the welfare of the child.

[56] And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] 1 LNS 77:

> The expression 'welfare' under section 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed.) is to be taken in its widest sense. It means the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.

[57] And when deliberating, the court should adopt "a process whereby, when all the relevant facts, relationship, claims and wishes of parents, (and potential adopters) risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood" - Lord MacDermott in *J v. C* [1970] AC 668 @ 710-711 and *Halsbury's Laws of England*, 4th edn, reissue, (Mackay) para 443.

[58] As we have suggested, the meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided cases as precedent has limited application. In this respect we answer the third question in the positive.

Question 4: Whether the rights of the plaintiff, the biological father, remain and are not extinguished despite the registration of the adoption of the child under the Registration of Adoptions Act 1952

[59] To answer this question we must first relate the difference between Registration of Adoption Act 1952 (Act 253) and the Adoption Act 1952 (Act 257).

[60] Both Acts were enacted in the same year and both relate to the adoption of a child. Generally, adoption made under Act 257 is referred to as the "court adoption" whilst one under Act 253 is considered as a "registrar adoption". This means an adoption under Act 257 must be made through a court process while an order for the registration of an adoption under Act 253 is made by the Registrar of Adoption (see s. 6(2) Act 253).

[61] The other major difference between the two methods of adoption is that Act 253 caters for a *de facto* adoption whilst an adoption order made under Act 257 includes adoption *dejure*. Thus, an application for adoption under Act 257 is more demanding and aside from other requirements, a notification to the Social Welfare Department of State is required before an adoption order can be made. This is not required under Act 253.

[62] The most crucial difference between the two Acts lies in the effect of the adoption. Under Act 257, "all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was born to the adopter in lawful wedlock". This provision is noticeably absent in Act 253. As the result of this, the Court of Appeal in *Re Loh Toh Met, deceased, Kong Lai Fong & Ors v. Loh Peng Heng* [1961] 1 LNS 109 decided that an adoption under the Registration of Adoption Ordinance (the forerunner of Act 253) confers no succession rights on the adopted child.

[63] In the course of argument here and below, questions were raised as to the objective and purpose of these two pieces of legislation passed in the same year and concern the same subject matter: adoption of a child. Concurring with the views expressed

in the courts below, we are of the opinion that Act 253 was enacted to cater for Muslims whose personal laws are repugnant to adoption yet it is a common practice for Muslims in this country to "adopt" a child. This is reflected in s. 31 of Act 257 which declares that "This Act shall not apply to any person who professes the religion of Islam ...". Support for this view can be found in footnote 6 of para. 140-073 in *Halsbury's Laws of Malaysia*, 2003 Reissue, vol. 8 which states:

> It should be noted that the Registration of Adoptions Act 1952 was intended for the use of Muslims. This is because Islam does not recognize adoption and in order to legitimize such customary practices, the adoption could be registered under this Act so as to safeguard the right to custody of the adopted parents.

[64] And as the High Court in this case elaborated: "Without proper documentation, how else then can a Muslim couple who has taken upon themselves the care of a child go about doing simple routine things such as enrolling the said child into a school, or for the purpose of obtaining identity cards or even applying for passports?"

[65] Having discussed earlier the difference between Act 253 and Act 257 and the objective and intention of Act 253, we shall now deal with the status of the adopted child, his adopted parent or parents and his natural parent or parents. This will have a bearing to the question posed.

[66] According to *Halsbury's Laws of Malaysia*, vol. 8 para 140.073:

> The Registration of Adoptions Act 1952 does not provide for any form of legal status to the adopted child. It merely provides for registration of the *de facto* adoption and recognises indirectly the right to custody of the adopted child and the continuing responsibilities of the adoptive parents to maintain and educate the adopted child.
>
> The adopted child will not have a right to inherit any property from the adoptive parents' estate should they die intestate unless property is given *inter vivos* as a gift. It may be arguable that an adopted child has the right to apply for provision under the Inheritance (Family Provision) Act 1971.
>
> The adopted child is not stated as being treated as a child of the adopter born in lawful wedlock as in the Adoption Act 1952.

This view is shared by the Court of Appeal in this instant case when they said:

> Act 253 merely lends legal recognition to the *de facto* status of the adoptive parent having custody and being responsible for the care, maintenance and welfare of the adopted child.

[67] We agree with this statement. Though both Act 253 and Act 257 deal with adoption of a child, the effect of an adoption undertaken under Act 253 is limited. Unlike Act 257, "all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was born to the adopter in lawful wedlock" is not provided under Act 253. Act 253 only caters for the registration of a *de facto* adoption and as such it only confers upon the adopter parent or parents a custodian right with responsibilities to care, maintain and educate the adopted child. Other than these, it confers none of those rights exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock as spelled out in Act 257.

[68] Possessing such limited right over the adopted child, the plaintiff argued before us that "this court should have no hesitation in declaring null and void and invalidating the order of registration of adoption made by the Registrar."

[69] We cannot see the logic in this submission. There must be a distinction between the rights of the adoptive parents over the child in an adoption registered under Act 253 and the validity of the adoption itself. It is certainly unacceptable to rule that just because the adopter parents under this Act have only custodian, care, maintenance and educational right over the child, the adoption is invalid by the appearance of a natural parent who demands it so. In our view, the adoption remains valid. It was properly registered after due process in accordance with the law. Unless it is set aside, and there is no creditable ground to do so here, it remains good in law.

[70] Now returning to the question before us relating principally to the rights of the plaintiff as the biological father of the child, we would like to begin by highlighting a passage from Professor Mimi Kamariah Majid's text on *'Family Law in Malaysia'* at pp. 217, 218. This is with the objective of shedding some light on the status of the natural parent or parents. Though this refers primarily to Muslims where, perhaps, all parties ie, the child concern, the natural parent or parents and the adoptive parent or parents are Muslims (for which Act 253 was intended) it throws some light on the status of parties in this instant case.

> There is no adoption according to Islamic Law. If a man adopts a son or a daughter, the law does not confer on the adopted child the status or rights of a natural son or daughter. According to the Quran, if a person is not someone's real son, he does not become his natural son merely by virtue of a declaration ...
>
> In the Malay community, customary adoptions prevail where a couple may adopt a child and may proclaim that the child is the son of or the daughter of the male spouse of the couple who adopts him or her. Despite this, the links between the child and his natural parents are never severed. A Muslim girl still needs to obtain the consent of her natural father, as her wall, or guardian for marriage, before she may get married, unless, of course, one of the exceptions to this requirement apply(ies). Similarly a Malay Muslim girl will always be considered as not belonging to the same muhrim as her adoptive father.

[71] While Act 253 is not restricted to Muslims since there is no provision to this effect (and see *Jainah Semah v. Mansor Iman Mat & Another* [1951] 1 LNS 31), we maintain that the legal rights of the natural parent or parents remain as conferred by law. This is based on the rational that an adoption under Act 253 confers upon the adopter parents only custodian, care, maintenance and educational right for the child. With this we answer the question posed to us in the positive.

[72] Miss Foo in her written submission also raised the issue of the right of the 3rd and 4th defendants to convert J to a Muslim. She argued that since the 3rd and 4th defendants have only custodian right they have no right to convert J. She then went on to submit that under art. 12(4) of the Federal Constitution, the plaintiff, as the natural parent of the J, possesses the right over the religion of a minor.

[73] But surprisingly, this issue is not reflected in the question posed to us. All questions before us are centred on the right of the plaintiff and the validity of the adoption to which we have answered. None touch on this aspect of conversion. Under r. 47 of the Rules of the Federal Court "the hearing of the appeal shall be confined to matters, issues or questions in respect of leave to appeal is granted". Though we have stated in the recent case of *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51 (08-266-2009 & 08-267-09 (W)) that questions can be amended and added from those originally posed, there was no formal application before us to do so. As the question posed is necessary to identify the issue raised inclusion of other matter which has not been added to or included in the original question by way of amendment may cause confusion to the real issue required to be determined. Further, parties may not have come prepared to argue this. Though, as stated by us in *Terengganu Forest Products Sdn Bhd* that question framed is procedural but this process is still necessary to achieve the objective of s. 96(a) of the Courts of Judicature Act. For this reason, we refuse to entertain the last issue raised by the plaintiff before us.

Conclusion

[74] In conclusion, we dismissed this appeal with costs. However, in view of our opinion expressed above, we accept that the Court of Appeal had erred in revoking the 2nd order of the High Court in respect of rectifying the birth certificate of J to reflect the plaintiff as the father of J. We set aside this part of the order of the Court of Appeal and reinstate the 2nd order granted by the High Court.